Supreme Court, U. S.
FILED
DEC 12 1979
MICHAEL RODAK, JR., CLERK

TO THE SUPREME COURT OF THE UNITED STATES

No. 79-9171

Edward Raymond LeCompte,
Petitioner

vs.

United States of America
Respondent

On Petition For Writ Of Certiorari

A. Cecil Palmour
Cook & Palmour
Post Office Box 370
Summerville, GA 30747

Counsel for Petitioner

TABLE OF CONTENTS

	Page
Jurisdictional Statement	1
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statement of the Case	2
Argument	4
Reason for Grant of Certiorari	10
Conclusion	14
Certificate of Service	15
Appendix	

TABLE OF AUTHORITIES

CASES:

Blumenthal v. United States,
332 U.S. 539 (1947)..... 4

Desist v. United States,
394 U.S. 244 (1969)..... 10

Glasser v. United States,
315 U.S. 60 (1942).....4, 5, 12, 13

Hamling v. United States,
418 U.S. 87 (1974)..... 4

Hankerson v. North Carolina,
U.S.___, 97 S.Ct. 2339
(1977)..... 10

United States v. Nixon,
418 U.S. 683 (1974)..... 5

Winship, in re, 397 U.S. 358 (1970)... 6

Glover v. United States,
306 F.2d 594 (10 Cir. 1962).... 5

Phelps v. United States,
160 F.2d 858 (8 Cir. 1947)..... 6, 7, 12

Poliafico v. United States,
237 F.2d 97 (2 Cir. 1976)..... 6

Tomplain v. United States,
42 F.2d 202 (5 Cir. 1930)..... 11

United States v. Bentvena,
319 F.2d 916 (2 Cir. 1963)..... 12

United States v. Callaway,
524 F.2d 609 (9 Cir. 1975)..... 12

United States v. Chambers,
382 F.2d 910 (6 Cir. 1967)..... 12

*United States v. Consolidated
Laundries*, 291 F.2d 563 (2 Cir.
1960)..... 13

United States v. Cooper,
567 F.2d 252 (3 Cir. 1977)..... 13

United States v. Craig,
522 F.2d 29 (6 Cir. 1975)..... 5

United States v. Dixon,
562 F.2d 1138 (9 Cir. 1977)..... 12

United States v. Duckett,
550 F.2d 1027 (5 Cir. 1977)..... 5

United States v. Freie,
545 F.2d 1217 (9 Cir. 1976)..... 6

United States v. Garcia,
562 F.2d 411 (7 Cir. 1977)..... 12

United States v. Gimelstob,
475 F.2d 157 (3 Cir. 1973)..... 13

United States v. James,
590 F.2d 575 (5 Cir. 1979)..... 5, 6

United States v. Johnson,
467 F.2d 804 (1st Cir. 1972)..... 5

United States v. Kates,
508 F.2d 308 (3 Cir. 1975)..... 6, 13

United States v. Kenny,
462 F.2d 1205, 1226.....
(3 Cir. 1972) 13

United States v. Kirk,
534 F.2d 1261 (8 Cir. 1977)..... 7

United States v. Lustig,
555 F.2d 737 (9 Cir. 1977)..... 12

United States v. Malatesta,
583 F.2d 748 (5 Cir. 1978)..... 8, 11

United States v. Malatesta,
590 F.2d 1379 (5 Cir. 1979)..... 8, 9, 11

United States v. Mayes,
512 F.2d 637 (6 Cir. 1974)..... 5

United States v. Morado,
454 F.2d 167 (5 Cir. 1972)..... 5

United States v. Santos,
385 F.2d 43 (7 Cir. 1967)..... 5

United States v. Schmaltz,
562 F.2d 558 (8 Cir. 1977)..... 12

United States v. Stromberg,
268 F.2d 256 (2 Cir. 1959)..... 12, 13

United States v. Wyant,
576 F.2d 1312 (8 Cir. 1968)..... 12

Connecting Defendants to Conspiracies,
Virginia Law Review 64:881 (1978).. 5, 11

Developments in the Law - Criminal Conspiracy 72 Harv.L.Rev. 980 (1959)... 4

Herman, Frivolous Criminal Appeals,
47 N.Y.U. L.Rev. 701 (1972)..... 6

Levie, Hearsay and Conspiracy,
52 Mich.L.Rev. 1159 (1964)..... 4

LaFave & Scott, Handbook,
458, 459 (1972)..... 4

JURISDICTIONAL STATEMENT

Opinions Below

The first opinion of the Fifth Circuit Court of Appeals in this case was rendered on August 9, 1978 (Exhibit "A" of Appendix). Following petition for rehearing and suggestion of *en banc* consideration (but *en banc* consideration denied) the opinion was modified (Exhibit "B" of Appendix) on November 6, 1978. This opinion, as modified, is reported (544 F. 2d 1247).

The judgment of the District Court (prior to appeal) was one granting motions of acquittal of defendants LeCompte and Hatmaker (Exhibit "C" of Appendix). Upon remand by the Circuit Court, the District Court denied amended motions for new trial and affirmed the convictions. Upon appeal, the Fifth Circuit affirmed (Exhibit "D" to Appendix) (___F.2d___).

LeCompte made petition for rehearing, and suggested *en banc* consideration (Exhibit "E" to Appendix) on July 26, 1979.

On September 6, 1979, LeCompte submitted additional memoranda (Exhibit "F" to Appendix).

LeCompte's petition for rehearing and for *en banc* consideration was denied on November 14, 1979 (Exhibit "G" to Appendix).

Jurisdiction

This court has jurisdiction to entertain this writ of certiorari under the provisions of 28 USCA 1254.

Questions Presented

(1) In reviewing a guilty verdict disapproved by the District Judge (on motion for acquittal) is defendant's connection with a conspiracy to be established by "slight evidence" or by "substantial evidence"?

(2) Where the Circuit Court has changed its criteria for review from the "slight evidence" test to the "substantial evidence" test, is a defendant whose case is then pending before the court entitled to the benefit of the "substantial evidence" test?

Statement of the Case

LeCompte, along with ten other defendants, was convicted by a jury for conspiracy to engage in interstate prostitution. Upon LeCompte's motion following the verdict, the District Judge ordered his acquittal, based upon lack of proof of his connection with the conspiracy (Appendix Exhibit "C").

The United States Court of Appeals for the Fifth Circuit reversed. Its opinion was that only "slight evidence" was required to connect defendant with a conspiracy (Appendix, Exhibit "A"). Upon *LeCompte's* motion for reconsideration because of insufficiency of evidence, the "slight evidence" language was deleted, without comment as to the quantum required (Appendix, Exhibit "B").

Upon remand and motion for new trial, the District Court entered judgment of conviction pursuant to the Circuit Court opinion. *LeCompte* appealed.

While LeCompte's appeal was pending, the Fifth Circuit Court of Appeals disapproved the "slight evidence" test. *United States v. Malatesta*, 590 F.2d 1379, 1382 (Mar. 12, 1979). *LeCompte*, on March 26, 1979, in response to the Court's request of March 23, 1979, for comment upon decisions rendered since briefing, urged the Court to apply *Malatesta* to his case, because the Court had decided on Nov. 8, 1978, to reconsider the "slight evidence" test; *Malatesta*, 583 F.2d 748; and had denied his motion on November 6, 1978 (App., Ex. "E"). This was prior to oral argument, and the point was made at oral argument (*Id.*, p. 1).

The Court rendered its opinion on July 18, 1979. ___F.2d___ (5 Cir.)(Appendix, Exhibit "D"). *LeCompte* moved for rehearing and for *en banc* consideration upon the ground that the change from the "slight evidence" to the "substantial evidence" test had been overlooked (Appendix, Exhibit "E"). On September 6, 1979, *LeCompte* submitted memo citing *Hankerson v. North Carolina*, ___U.S.___, 97 S.Ct. 2339 (1977), to support his contention that failure to apply the "substantial evidence" test to his case would not comport to "administration of justice with an even hand" (Appendix, Exhibit "F"). The petitions for rehearing and for *en banc* consideration were denied on November 14, 1979 (Appendix, Exhibit "G").

ARGUMENT

(1) The "slight evidence" test is not an appropriate appellate criteria for judging defendant's connection with a conspiracy. The rule as expressed has been that "slight evidence" is sufficient to connect a defendant to a conspiracy once its existence has been proved (cases cited in "Reasons for Grant of Certiorari").

The conspiracy itself should be established by substantial evidence. *Glasser v. United States*, 315 U.S. 60, 80 (1942); *Hamling v. United States*, 418 U.S. 87, 124 (1974).

Related rules in conspiracy prosecutions have sensitized the evidentiary quantum: Secrecy and concealment being essential features of a successful conspiracy (*Blumenthal v. United States*, 332 U.S. 539, 557 - 1947), indirect proof is necessary. *Levie, Hearsay and Conspiracy, A Re-Examination of the Co-Conspirator's Exception to the Hearsay Rule*, 52 Mich.L.Rev. 1159, 1160 (1964). The hearsay rules, of course, permit extrajudicial statements. *Levie, Hearsay and Conspiracy*, 52 Mich.L.Rev., note 20, p. 1161 (1954). Group trials increase the probability of an individual's conviction by association. *W. LaFave & A. Scott, Handbook on Criminal Law*, §61, n. 8, at 458-459 (1972); *Developments in the Law - Criminal Conspiracy*, 72 Harv.L.Rev. 980, n. 13 (1959).

A difference in the evidentiary quantum required for establishing the conspiracy itself versus a given defendant's connection with it risks fracture of the concept that guilt remain "individual and personal". *United States v. Duckett*, 550 F.2d 1027 (5 Cir. 1977); *United States v. Morado*, 454 F.2d 167, 175 (5 Cir. 1972). Whatever test is used should assure the preservation of the "reasonable doubt" standard. *United States v. Mayes*, 512 F.2d 637, 647 (6 Cir. 1974), *cert. denied*, 422 U.S. 1008, 423 U.S. 840 (1975).

The rule itself - the necessity to *"connect"* a given defendant with the conspiracy - infers the existence of a conspiracy among *others*. *Connecting Defendants to Conspiracies*. Virginia Law Review 64, p. 881, at 892 (1978).

However, the mechanics vary among the Circuits: In applying the rule that admissions of a co-conspirator may be introduced only after independent proof [*Glasser v. United States*, 315 U.S. 60, 74, 75 (1942); *United States v. Nixon*, 418 U.S. 683, 701 (1974)], some circuits combine the defendant's and the witness' connection into one general test. *United States v. Johnson*, 467 F.2d 804, 807 (1st Cir. 1972), *cert. denied*, 410 U.S. 909 (1973); *United States v. Craig*, 522 F.2d 29, 31 (6 Cir. 1975). Others separate the two elements, requiring proof of conspiracy and then demonstration of the connection. *United States v. Santos*, 385 F.2d 43, 44 (7 Cir. 1967), *cert. denied*, 390 U.S. 954 (1968); *Glover v. United States*, 306 F.2d 594, 595 (10 Cir. 1962).

The Fifth Circuit, in *United States v. James*, 590 F.2d 575, at 580-581, concluded that this court's decision in *United States v. Nixon*, 418 U.S. 683, at 701 (1974) placed the responsibility upon the trial judge to determine "questions of fact relating to admissibility of the (co-conspirator) statement." (590 F.2d at 580)

> (A) declaration by one defendant is admissible against other defendants only where there is a "sufficient showing, by independent evidence of a conspiracy among *one or more other defendants* and the declarant and if the declarations at issue were in furtherance of that conspiracy". 418 U.S. at 701, 94 S.Ct. at 3104, 41 L.Ed.2d at 1060 (emphasis ours), and that "as a preliminary matter, there must be *substantial, independent* evidence of a conspiracy at least enough to take the question to the jury". *Id.*, at 701, n. 14. (emphasis by Court of Appeals) (590 F.2d at p. 581) (quoting *United States v. Nixon, supra)*

In cases where proof of defendant's connection is sought other than by a co-conspirator statement, there is apparently no demarcation between proof of conspiracy and proof of individual connection with it. *Poliafico v. United States*, 237 F.2d 97 104 (2 Cir. 1956); *United States v. Kates*, 508 F.2d 308, 310 (3 Cir. 1975); *United States v. Freie*, 545 F.2d 1217, 1221-1222 (9 Cir. 1976), *cert. denied*, 430 U.S. 966 (1977). "Slight evidence" thus merges into the totality of proof, tending either to dilute the "reasonable doubt" standard [*In re Winship*, 397 U.S. 358, 364 (1970)], or to overburden appellate review. *Herman, Frivolous Criminal Appeals*, 47 N.Y.U.L.Rev. 701 (1972). A conscientious appellate review would appear insufficient to meet the "reasonable doubt" standard, if "slight evidence" is adequate to connect defendant with the conspiracy.

The language of *Phelps v. United States*, 160 F.2d 858 (8 Cir. 1947), *cert. denied*, 334 U.S. 860 (1948), that "It is therefore possible, for the circumstances (of) an individual defendant's participation in an established conspiracy to become

substantial from their weight in position and context, though in abstractionthey may seem only slight," (*Id.*, at 867-868), suggests that there be proof, circumstances, or inferences *from the "established conspiracy" itself*, in addition to, or to support, the "slight evidence". However, subsequent cases state the "slight evidence" rule without qualification. *U. S. v. Kirk*, 534 F.2d 1262, *cert. denied*, 430 U.S. 906 (8 Cir. 1977); *U. S. v. Wyant*, 576 F.2d 1312 (8 Cir. 1978); *Cave v. United States*, 390 F.2d 58 (8 Cir. 1968), *cert. denied*, 88 S.Ct. 2059 (1969), as do other circuits (see cases cited in Reasons for Grant of Certiorari).

A "slight evidence" test is especially inappropriate to connect a defendant to a conspiracy, because of relaxed rules of evidence in conspiracy cases, and the practice of joining numerous defendants in one trial. The fact that this is only a criteria for appellate review does not increase the quantum required for conviction. It would not be logical to assume that the appellate courts would affirm as many convictions under a "substantial evidence" test that they would under the "slight evidence" test.

> (2) Defendant is entitled to the "substantial evidence" test to connect him to the conspiracy: or at least to a rule of law as to the basis upon which his connection with the conspiracy is predicated.

This is a short chronology of LeCompte's quandary:

The District Judge granted his motion for acquittal, following jury verdict of guilt, upon the

ground of insufficiency of evidence to connect him with the conspiracy. The Circuit Court on August 9, 1978, reversed, stating that "slight evidence" was sufficient to connect him with it (Appendix, Exhibit "A"). *LeCompte* moved for rehearing and for *en banc* consideration of the sufficiency of the evidence. During that same period, the case of *United States* v. *Malatesta*, 583 F.2d 748 (5 Cir. 1978), was pending in that Circuit.

On November 6, 1978, the Circuit Court denied LeCompte's motions for reconsideration. 577 F.2d 1247, 1255 (5 Cir. 1978) and at the same time deleted from the opinion the "slight evidence" language which appeared in its opinion of August 9, 1978 (Appendix, Exhibit "B"). That was the only change from its original opinion.

On November 8, 1978, the Circuit Court granted *en banc* consideration of the validity of the "slight evidence" rule it had previously applied in conspiracy cases. *Malatesta*, (above) 583 F.2d 748 (5 Cir. 1978).

The District Court, in LeCompte's case, pursuant to the Circuit Court mandate, entered judgment of conviction based upon the prior jury verdict of guilt. *LeCompte* appealed, based upon grounds made in a motion for new trial. That appeal was pending on March 12, 1979, upon which date the Circuit Court's *en banc* decision in *Malatesta* was rendered. 590 F.2d 1379 (5 Cir. March 12, 1979).

On March 23, 1979, the Circuit Court, in *LeCompte's* case requested comment upon relevant decisions rendered since briefing. On March 26, 1979, *LeCompte* replied (Attachment to Appendix, Exhibit "E"), calling to the Court's attention the *Malatesta* case.

On July 18, 1979, the Circuit Court affirmed *LeCompte's* conviction (Appendix, Exhibit "D"). *LeCompte* moved for rehearing and for *en banc* consideration upon the ground that *Malatesta* should apply to him (Appendix, Exhibit "E"). On Sept. 6, 1979, LeCompte submitted additional memoranda upon retroactivity (Appendix, Exhibit "F"). The Circuit Court denied rehearing and denied *en banc* consideration on November 14, 1979 (Appendix, Ex. "G"). Neither its opinion of July 18, 1979 (App., Ex. "D") nor its denial of rehearing (App., Ex. "G") mentioned applicability of *Malatesta* to *LeCompte's* case.

LeCompte's contention is this:

He was convicted under the "slight evidence" test, because the District Judge applied that test, although he found the evidence insufficient (App., Ex. "C"); and the original opinion of the Circuit Court applied the "slight evidence" test. The modification of that opinion deleted only the "slight evidence" language, and did not otherwise change the opinion (App., Ex. "B"). The opinions on LeCompte's subsequent appeal did not clarify whether the "slight evidence" test was applied to *LeCompte* (Appendix, Exhibits "D" and "G"). Since *Malatesta* had stated that the "slight evidence" test would apply to appeals decided thereafter (above), *LeCompte's* conviction was presumptively under the "slight evidence" test. However, the deletion of the "slight evidence" language from the opinion (above) two days after the grant of *en banc* consideration of *Malatesta* indicates an awareness of schism.

Assuming that application of the "slight evidence" rule has reached such proportions that prospectivity is necessary, its application to *LeCompte* would be inappropriate: The Government's appeal in his case was pending at the same time as that of *Malatesta*; accordingly no appeals would be spawned. To deny application of the "substantial evidence" test to *LeCompte* "(H)ardly comports with the ideal of 'administration of justice with an even hand'". *Hankerson v. North Carolina*, _____ U.S. _____, 97 S.Ct. 2339 (1977) [quoting from *Desist v. United States*, 394 U.S. 244 (1969)].

Reason for Grant of Certiorari

To resolve the conflict among the Circuit Courts of the United States as to the quantum of evidence necessary to connect one of several defendants to a conspiracy, once the existence of the conspiracy has been proved.

The conflict is substantial. A "slight evidence" test was spawned by the Fifth Circuit decision of *Tomplain v. United States*, 42 F.2d 202, 203 (5 Cir. 1930). *United States v. Malatesta*, 583 F.2d 748, at 760 (concurring opinion).

> From 1930 ... until 1963 only 12 reported cases cited (*Tomplain*) and fewer than 15 did from 1963 to 1970. Since 1970 ... Federal Courts of Appeal applied the rule 5 times in 1971, 6 in 1972, and 9 in 1973. At least 15 cases per year since then have referred to it. In 1977, at least 36 Federal cases cited the rule at the Circuit level... In cases reported from January, 1977, through September 1, 1978, the Fifth Circuit invoked the rule 28 times, and the Ninth Circuit applied it in 19 cases.
>
> *Connecting Defendants to Conspiracies: The Slight Evidence Rule and the Federal Courts, Virginia Law Review 64; 881, note 4 (1978).*

Upon *en banc* consideration in *United States v. Malatesta*, 590 F.2d 1379, 1382 (5 Cir. 1979), the Fifth Circuit overruled *Tomplain*. Its view was that *Glasser v. United States*, 315 U.S. 60, 80 (1942), and *Hamling v. United States*, 418 U.S. 87, 124 (1974), required application of the "substantial evidence" test (590 F.2d at 1382). Judge Coleman's opinion in the original review of *Malatesta* was that the "substantial evidence" test was the "firmly established" law of the Fifth Circuit (583 F.2d at 761) and that the "slight evidence" test was spurious (583 F.2d at 761-762).

The Ninth Circuit has expanded the test from a standard of appellate review to one permitting instructions to the jury that only "slight evidence" is necessary to connect a defendant to the conspiracy. *United States v. Lustig*, 555 F.2d 737 (9 Cir. 1977), *cert. denied*, 434 U.S. 1045 (1978). Also see, *United States v. Dixon*, 562 F.2d 1138 (9 Cir. 1977); *United States v. Callaway*, 524 F.2d 609, 615 (9 Cir. 1975), *cert. denied*, 424 U.S. 967 (1976).

The Sixth Circuit applies the "slight evidence" test. *United States v. Chambers*, 382 F.2d 910, 913(5), and precedents there cited.

The *Eighth Circuit* first applied a "slight but substantial in context" test. *Phelps v. United States*, 160 F.2d 858 (8 Cir. 1947), *cert. denied*, 334 U.S. 860 (1948); but now applies a "slight evidence" test apparently without qualification. *United States v. Schmaltz*, 562 F.2d 558 (8 Cir. 1977), *cert. denied*, ___ U.S. ___ (98 S.Ct. 485); *United States v. Wyant*, 576 F.2d 1312 (8 Cir. 1978).

The Seventh Circuit "must take the view of the evidence which most favors the Government, and *if substantial evidence supports the jury's conviction*, we will not reverse it." *United States v. Garcia*, 562 F.2d 411, at 414 (7 Cir. 1977) (emphasis added), citing *Glasser v. United States*, 315 U.S. 60, 80 (1942). This language was used in considering defendant's contention that "there must at least be evidence to support the inference that the defendant in some way joined and participated in the conspiratorial scheme." (562 F.2d at 414)

The Second Circuit says that the evidence to connect a defendant with the conspiracy "must be substantial, and not 'too slight'." *United States v. Bentvena*, 319 F.2d 916, at 949 (2 Cir. 1963). The "too slight" language comes from *United States v. Stromberg*, 268 F.2d 256, at 267 (2 Cir. 1959):

> It is incumbent upon us to examine the contentions that even if the Government witnesses are believed, the independent evidence connecting each defendant with the conspiracy is insufficient to sustain his conviction.
>
> (268 F.2d at p. 267, citing *Glasser*, above)
>
> (T)he independent evidence was too slight to warrant the admission of hearsay declarations and too slight to submit to the jury.
>
> (268 F.2d at 267)
>
> The independent proof may be circumstantial, but it must be "substantial" and not "too slight".
>
> *United States v. Consolidated Laundries*, 291 F.2d 563 (2 Cir. 1960)(citing *Stromberg*).

The Third Circuit viewed the "slight evidence" language (of cases there noted) as "no more than a shorthand expression of the rule that, after a guilty verdict by a jury ... an appellate tribunal may not substitute its inferences from the evidence for those drawn by the factfinder." *United States v. Cooper*, 567 F.2d 252, 253 (1977) (citing *Glasser*, above). The "slight evidence" language appeared in previous Third Circuit decisions. *United States v. Kates*, 508 F.2d 308, 310 (3 Cir. 1975); *United States v. Gimelstob*, 475 F.2d 157, 164 (3 Cir. 1973), *cert. denied*, 414 U.S. 828 (1974). *United States v. Kenny*, 462 F.2d 1205, 1226 (Part V, Opinion)(3 Cir. 1972).

CONCLUSION

It would be timely for this Court to speak upon this "slight evidence" rule because its use has increased among the Circuits, and the volume of conspiracy cases continues to mount.

For the reasons here previously stated, we respectfully urge that the "slight evidence" rule be disapproved as a test for connecting a defendant to a conspiracy.

Due to the fact that the Fifth Circuit Court of Appeals changed from the "slight" to the "substantial" evidence test under the circumstances heretofore outlined, LeCompte respectfully urges remand for explication as to whether the "substantial evidence" test was applied, or should apply, to him.

Respectfully,

COOK & PALMOUR

By: A. Cecil Palmour
A. Cecil Palmour

P. O. Box 370
Summerville GA 30747

CERTIFICATE OF SERVICE

I have served the foregoing application for writ of certiorari with Appendix upon the United States, by mailing a copy of same to Mr. James E. Baker, 428 U. S. Courthouse, 56 Forsyth Street, N.W., Atlanta, Georgia 30303, the United States Attorney handing the matter.

This 10th day of December, 1979.

A. Cecil Palmour
Counsel for Petitioner

UNITED STATES of America, Plaintiff-Appellee,

v.

Mike CLEMONES, Priscilla Scott, Charles Everett Coburn, Jr., Joseph Harold Johnson, and William Alonzo Johnson, Jr., Defendants-Appellants.

UNITED STATES of America, Plaintiff-Appellant,

v.

Edward Raymond LeCOMPTE and Kathy Hatmaker, Defendants-Appellees.

Nos. 76-3866, 76-3870.

United States Court of Appeals, Fifth Circuit.

Aug. 9, 1978.

Defendants were convicted before the United States District Court for the Northern District of Georgia, Albert J. Henderson, Jr., Chief Judge, of substantive or conspiracy counts, or both, arising from multistate prostitution activities, and judgments of acquittal were entered as to two other defendants, and cross appeals were taken. The Court of Appeals, Godbold, Circuit Judge, held that: (1) prosecutor's ex parte order informing government witnesses that they were excused until the next day from further interviews by defense counsel was improper, but did not require reversal, in absence of showing of real, substantive impairment of defendants' right to fair trial; (2) Government's alleged failure to comply fully with discovery orders did not require reversal, in absence of showing of prejudice; (3) evidence sustained defendant's conviction of Mann Act violation; (4) evidence sustained defendant's conviction of traveling in interstate commerce with intent to carry on an unlawful activity; (5) evidence sustained defendant's conviction of conspiring to operate an interstate prostitution ring through a pattern of racketeering activities, and (6) evidence sustained jury's verdict that defendants were guilty of conspiring to operate an interstate prostitution ring through a pattern of racketeering activities.

Affirmed in part; reversed and remanded in part.

1. Criminal Law ⇐666½, 1168(2)

Prosecution's failure to serve forthwith as many government witnesses as possible with magistrate's order stating that government witnesses could talk with defense counsel, together with prosecution's ex parte order informing government witnesses that they were excused until the next day from further interviews by defense counsel was improper, but such action did not require reversal of defendants' convictions, in absence of showing of real, substantive impairment of defendant's right to fair trial.

2. Criminal Law ⇐1171.1(1)

Instructions allegedly given to government witness by assistant United States attorney, indicating that after defense objections to testimony were sustained, witness was to convey the information to jury anyway, did not require reversal of defendants' convictions, in absence of showing of prejudice to defendants.

3. Criminal Law ⇐1166(1)

Government's failure to turn over one FBI interview report, failure to tell defense counsel that a witness had told

Synopses, Syllabi and Key Number Classification
COPYRIGHT © 1978, by WEST PUBLISHING CO.

The Synopses, Syllabi and Key Number Classification constitute no part of the opinion of the court.

an FBI agent of some insignificant errors in transcript of his grand jury testimony, failure to tell defendants that in the past a government witness had been a paid informer, and Government's delay in giving to defense counsel the names of persons who had been promised immunity did not require reversal of defendants' convictions, in absence of showing of prejudice.

4. Conspiracy ⇐47(1)

Evidence in prosecution arising out of multistate prostitution activities sustained finding of the existence of a single conspiracy as charged, rather than multiple conspiracies.

5. Prostitution ⇐4

Evidence that defendant furnished intrastate transportation to prostitute after prostitute had crossed state line as part of a prearranged trip sustained defendant's conviction of Mann Act violation. 18 U.S.C.A. § 2421.

6. Prostitution ⇐1

Within meaning of statute making it unlawful to travel in interstate commerce with intent to carry on an unlawful activity and thereafter to perform an act to carry on said activity, the term "unlawful activity" includes any business enterprise involving prostitution offenses in violation of the laws of the state where committed. 18 U.S.C.A. §§ 1952, 1952(b).

See publication Words and Phrases for other judicial constructions and definitions.

7. Prostitution ⇐5

Evidence that defendant drove prostitute across state lines where prostitute had sexual relations with a man with whom defendant was attempting to negotiate a land transaction sustained defendant's conviction of traveling in interstate commerce with intent to carry on an unlawful activity, notwithstanding fact that prostitute was paid no money for her sexual favors. 18 U.S.C.A. §§ 1952, 1952(b); West's F.S.A. § 796.07.

8. Prostitution ⇐5

Evidence that defendant furnished or otherwise participated in the transportation of prostitute to points in other states sustained defendant's conviction of operating an interstate prostitution ring through a pattern of racketeering activities. 18 U.S.C.A. § 1962(c).

9. Conspiracy ⇐47(3)

Evidence sustained defendant's conviction of conspiring to operate an interstate prostitution ring through a pattern of racketeering activities. 18 U.S.C.A. § 1962(d).

10. Criminal Law ⇐1024(5)

Government can appeal a judgment of acquittal entered after a verdict of guilt.

11. Conspiracy ⇐48.1(1)

Once existence of a conspiracy is shown, only slight evidence is required to warrant submitting to the jury the question of a particular defendant's membership; Government is not required to prove that defendant had full knowledge of all details of conspiracy, but knowledge of its essential nature is sufficient.

12. Conspiracy ⇐47(3)

Evidence that prostitutes were brought from out of state, delivered to defendants, and were set up in business at establishments operated by defendants, and that some or all of them paid over earnings to defendants sustained jury's verdict that defendants were guilty of conspiring to operate an interstate prostitution ring through a pattern of racketeering activities. 18 U.S.C.A. § 1962(c).

Appeals from the United States District Court for the Northern District of Georgia.

Before JONES, GODBOLD and GEE, Circuit Judges.

GODBOLD, Circuit Judge:

In a three weeks jury trial the individual appellants were convicted of substantive or conspiracy counts, or both, arising from multi-state prostitution activities conducted at many locations in the South and Southeast.[1] The convictions of all appellants are affirmed. The United States also appeals, from judgments of acquittal entered by the trial court as to

1. Of the defendants involved in this appeal, all except Joseph Harold Johnson were convicted on Count One of the 44-count indictment. Count One charged each defendant with conspiring to operate an interstate prostitution ring through a pattern of racketeering activities in violation of 18 U.S.C. § 1962(d) (1976). Billy Johnson, Priscilla Scott and Mike Clemones were convicted on Count Two, which charged them with operating an interstate prostitution ring through a pattern of racketeering activities in violation of 18 U.S.C. § 1962(c) (1976). Charles Coburn was convicted on Count Forty-one, which charged a violation of 18 U.S.C. § 2421 (1976). Joseph Harold Johnson was convicted on Count Eighteen, which charged a violation of 18 U.S.C. § 1952(a) (1976). Additionally, Scott was convicted on two other counts, Clemones on four, and Billy Johnson on 19. Each of these counts charged a violation of 18 U.S.C. § 1952(a) (1976), 18 U.S.C. § 2421 (1976), or 18 U.S.C. § 2422 (1976).

The relevant portions of the statutes, all from 18 U.S.C., are set forth below.

§ 1961. Definitions

As used in this chapter—

(1) "Racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891–894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2421–24 (relating to white slave traffic), . . .

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity of the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or

two defendants after they were found guilty by the jury. We reverse the judgments of acquittal.

The evidence displayed organized prostitution in its most degrading aspects. The women ranged from experienced professionals to teen-age girls as young as 14, some induced into prostitution by promises of money, clothing and cars, others forced by beatings and threats of violence, even some recruited through their parents. They worked with and often were controlled by pimps to whom they turned over their earnings, and when necessary they were disciplined by threats, beatings and pistol whippings.

By plane, bus and the cars of pimps the women were moved from location to location on command, from Virginia to Alabama, to cities, towns and rural truck stops, where they operated in houses of prostitution, apartments, massage parlors, mobile homes and the outbuildings of rural service stations. Some were "owned" by one pimp, others by "joint owners." Women were "sold" by one pimp to another.[2] Arrangements were made for abortions, releases on bail and even dental care. The take was large, for example $110,000 in five to six months at a small-town Georgia truck stop. Prostitutes earned as much as $400–$500 per week; as little as clothing money.

through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b) or (c) of this section.

Added Pub.L. 91-452, Title IX, § 901(a), Oct. 15, 1970, 84 Stat. 942.

§ 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

* * * * * *

§ 2421. Transportation generally

Whoever knowingly transports in interstate or foreign commerce, or in the District of Columbia or in any Territory or Possession of the United States, any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice; or

Whoever knowingly procures or obtains any ticket or tickets, or any form of transportation or evidence of the right thereto, to be used by any woman or girl in interstate or foreign commerce, or in the District of Columbia or any Territory or Possession of the United States, in going to any place for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent or purpose on the part of such person to induce, entice, or compel her to give herself up to the practice of prostitution, or to give herself up to debauchery, or any other immoral practice, whereby any such woman or girl shall be transported in interstate or foreign commerce, or in the District of Columbia or any Territory or Possession of the United States—

Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

June 25, 1948, c. 645, 62 Stat. 812; May 24, 1949, c. 139, § 47, 63 Stat. 96.

§ 2422. Coercion or enticement of female

Whoever knowingly persuades, induces, entices, or coerces any woman or girl to go from one place to another in interstate or foreign commerce, or in the District of Columbia or in any Territory or Possession of the United States, for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose on the part of such person that such woman or girl shall engage in the practice of prostitution or debauchery, or any other immoral practice, whether with or without her consent, and thereby knowingly causes such woman or girl to go and to be carried or transported as a passenger upon the line or route of any common carrier or carriers in interstate or foreign commerce, or in the District of Columbia or in any Territory or Possession of the United States, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

June 25, 1948, c. 645, 62 Stat. 812.

I. Denial of access to witnesses

[1] The assistant United States Attorney handling the case instructed some 30 to 35 witnesses appearing before the grand jury that the proceedings were secret and that they should not discuss their testimony with anyone other than their attorneys or government agents. The defense learned of this and filed a motion asking to be permitted to talk to the witnesses. A magistrate heard the motion and, on March 26, 1976, entered an order stating that the witnesses could talk with defense counsel. He ordered that each witness subpoenaed by the government be served forthwith with a copy of the order.

The case was set for trial April 5. The government asserts that on April 5 a copy of the order was given to all, or most, of the witnesses. The defendants say this was not done until July 12. The case was continued to June 7, and before that date continued again to July 12. On July 12 the court learned that defendants still had not had full access to the witnesses who had appeared before the grand jury. In some instances defense counsel had been able to talk to, and even get a statement from, a witness. The government does not dispute, however, that in the main the witnesses had not been interviewed by the defense. It is unclear whether this was caused by lack of knowledge of the magistrate's order, failure of the government to serve the order, dilatoriness of the defendants, or some combination of these factors. For purposes of this appeal, we assume the fault was the government's.

The district judge tried to rectify the matter. The witnesses were assembled in the courtroom with government counsel excluded and advised of their rights and obligations as witnesses. Defense counsel began interviewing persons willing to submit to interviews. There were approximately 12 defense counsel present, and about 10 of some 80 witnesses were interviewed on July 12. As this process began either the magistrate or the assistant United States Attorney told some of the witnesses not yet interviewed that they were excused until the next day. Before the actual trial began the following day the defendants moved for a continuance based on their inability to prepare. The motion was denied. The trial began and lasted three weeks.

2. One young girl, not previously a prostitute, was "delivered" by Billy Johnson to an Alabama truck stop to be a waitress. She refused to engage in prostitution, Johnson came back and beat her, and she acceded. The operator, Cleburn, returned her to Johnson after a few days and Johnson then "sold" her to another pimp for $500.

All defendants contend these events deprived them of a fair trial. The government has conceded, grudgingly and half-heartedly, that the instructions to the witnesses were improper.[3] It has not satisfactorily explained the failure to serve the magistrate's order forthwith on as many witnesses as could be found. The government erred, but other than general allegations of prejudice the defendants have not shown that they were really harmed by belated access to the witnesses. The names of some witnesses were revealed by the indictments. By July 12 some of the defendants had already talked to, and even obtained statements from, some witnesses. Several days before trial the government furnished statements of witnesses, FBI reports of interviews and grand jury testimony. On the first day of trial the government furnished defendants a list of government witnesses. No particularized prejudice is even argued with respect to any specific witnesses. Defendants made no showing that they could not interview witnesses as the long trial progressed. When the government rested after two weeks and 47 witnesses, no defendant asked for additional time to further prepare a defense or to locate additional witnesses.

Defense counsel were indignant at the government's interference with their access to witnesses and its inept response to corrective efforts, and they were entitled to be indignant. But they have not demonstrated real, substantive impairment of their right to fair trial.

II. Other prosecutorial misconduct

[2] On cross-examination it was brought out that government witness Lawrence had given a statement to an investigator for some of the defendants in which he described instructions that he said were given him by the assistant United States Attorney concerning how he should conduct himself when called as a witness. The general effect of the alleged instructions was that when defense objections had been sustained to testimony, upon a signal from the assistant United States Attorney witness Lawrence would get the information over to the jury anyhow. If the alleged instructions were given, it is not shown that any prejudice to defendants resulted. The same analysis applies to the testimony of a hostile government witness, who stated that when she questioned what she said were inaccuracies in a statement previously taken from her by the FBI, the assistant United States Attorney threatened her with a perjury charge "if [she] got on the stand and lied."

III. Discovery

[3] Before trial the government turned over to defendants a great volume of Jencks Act material. Defendants complain of the failure to turn over one FBI interview report, failure to tell the defense that a witness had told an FBI agent of some insignificant errors in the transcript of his grand jury testimony, and failure to tell defendants that in the past a government witness had been a paid informer. These complaints are overblown and in no instance shown to be prejudicial.

Also, the government was required to give the names of persons who had been promised immunity. It delayed in doing so despite several demands. Only a limited number of persons—the government says three—had been extended formal immunity. Nevertheless, the prosecutor realized that statements had been made informally to witnesses, particularly young prostitutes, that they were not going to be prosecuted for prostitution, and he furnished at trial a list of 30 names. The government's response was dilatory, but no defendant points out any prejudice.

IV. Single versus multiple conspiracies

[4] Some of the defendants raise the *Kotteakos*[4] contention that a single conspiracy was charged, multiple conspiracies proved. The conspiracy here is similar to that in *U. S. v. Perez*, 489 F.2d 51 (CA5, 1973). We eschew any effort to describe it in structural terms. It was a single-purpose and continuously ongoing undertaking to operate a multi-state prostitution enterprise. Prostitutes were recruited, "broken in," cared for, disciplined, moved from location to location, and dropped out of the ring or were put out. Many reappeared and rejoined. The nature of the enterprise necessarily included a cast part permanent and part changeable and changing, and constantly changing locations. Billy Johnson was the dominant force. Clemones, Dill, Surrett, Joseph Earl Johnson, and others were helpers, associated pimps and junior pimps, some not always present but floating in and out of the ongoing operation. We hold that there was no variance, but if there was the substantial rights of the defendants were not materially affected.

V. Defendant Scott

[5] Scott was not entitled to judgment of acquittal on count 10. Count 10 charged her with a violation of the Mann Act by aiding and abetting in the transportation of Thelma Ann Lunsford from Georgia to Johnson City, Tennessee, in 1973. Lunsford had been working in various cities for Billy Johnson. Johnson, in Rome, Georgia, told her that he was sending her to Johnson City, Tennessee. In Lunsford's presence Johnson called Scott, who operated a house of prostitution in Johnson City, and told Scott that he was sending Lunsford to Johnson City. Johnson took Lunsford to Chattanooga, Tennessee, where she caught a bus to Johnson City. She was met there at the bus station by Scott who took her to Scott's emporium. Lunsford worked there as a prostitute for two weeks, then on instruction from Johnson returned by bus to Chattanooga. Johnson met her there and drove her back to Rome. Lunsford gave Johnson money she had earned working for Scott. Later Lunsford traveled to Johnson City several more times, went to Scott's, and worked there as a prostitute.

Scott contends that on Lunsford's first trip in 1973 the only act she committed was to meet Lunsford at the bus station in Johnson City at which time the offense already had been completed. This overlooks the prearrangement consisting of the telephone call, followed by the

3. *See, e. g., U. S. v. White*, 454 F.2d 435 (CA7, 1971), *cert. denied*, 406 U.S. 962, 92 S.Ct. 2070, 32 L.Ed.2d 350 (1972); *Gregory v. U. S.*, 125 U.S.App.D.C. 140, 369 F.2d 185 (1966), *aff'd after remand*, 133 U.S.App.D.C. 317, 410 F.2d 1016, *cert. denied*, 396 U.S. 865, 90 S.Ct. 143, 24 L.Ed.2d 119 (1969).

The government represents that the assistant United States Attorney gave the erroneous instructions to the witnesses under what he thought was an office policy, and that he was motivated by protecting the witnesses, many of whom were young and frightened prostitutes, from publicity, threats and even violence. But denial of defense access to the witnesses, imposed on the prosecutor's ex parte order, was not the proper way to pursue these objectives.

4. *Katteakos v. U. S.*, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946).

actual interstate transportation with the last leg terminating at Scott's house in Johnson City. *U. S. v. Dimsdale,* 410 F.2d 358 (CA5, 1969), holds that the transportation necessary for conviction is complete when the state line is crossed. It does not stand for the converse, i. e., that furnishing transportation after the state line is crossed and as part of a prearranged interstate trip is not an offense. *See Cwach v. U. S.,* 212 F.2d 520 (CA8, 1954).

Scott received a three-year sentence on each count, all concurrent. Under the concurrent sentence doctrine, we need not consider the validity of Scott's convictions on counts 1, 2 and 25.

VI. Defendant Joseph Harold Johnson

By arrangement between this defendant and Billy Johnson, Lunsford went from Georgia to Florida to entertain "the Colonel," a man with whom this defendant was attempting to negotiate a land transaction. The defendant and Clemones drove Lunsford to this defendant's motel in Florida, where she met "the Colonel" and had sexual relations with him. He paid no money to her for her favors, and as far as she knew he paid no money to anyone.

[6, 7] Defendant was convicted under 18 U.S.C. § 1952, making it unlawful to travel in interstate commerce with intent to carry on an unlawful activity and thereafter to perform an act to carry on said activity. The term "unlawful activity" includes any business enterprises involving prostitution offenses in violation of the laws of the state where committed. 18 U.S.C. § 1952(b). The appellant says that under Florida law prostitution is confined to sexual intercourse for hire. But Fla.Stat.Ann. § 796.07 (West 1976) also includes in the definition "giving or receiving of the body for licentious sexual intercourse without hire." Appellant also argues that the isolated event with "the Colonel" does not amount to a business enterprise within § 1952. The jury could have concluded, however, that the defendant's motel was a business enterprise involving prostitution and that the trip to Florida was intended in part to facilitate the carrying on of unlawful activity in the motel.

VII. Defendant Clemones

[8] Clemones asserts that he was entitled to judgment of acquittal on the conspiracy count and on substantive counts 2, 16, 17, 18 and 25. His argument, in essence, is that the evidence of his furnishing or otherwise participating in the transportation of prostitutes to points in other states shows no more than that "he went along for the ride" with defendant Billy Johnson. Billy Johnson was the master pimp of the network. Clemones was deeply involved with Johnson and the network in many ways that were described to the jury. The jury could infer that Clemones, who was active on numerous other occasions in various ways—including transporting prostitutes to other states—was not an innocent guest on these delivery runs but was a central figure in the conspiracy.

Because Clemones' sentences under counts 2, 16, 17, 18 and 25 are concurrent with his sentence under the conspiracy count, we need not consider his remaining arguments.

VIII. Defendant Coburn

[9] Coburn was convicted on counts 1 and 41. He received concurrent sentences.

A pimp named Surrett, with whom Billy Johnson had many dealings, testified that Johnson asked him to go into partnership with Johnson and Coburn for conducting prostitution at Coburn's truck stop in Cedar Bluff, Alabama. Johnson brought a young girl from his trailer at Rome, Georgia, to Coburn's place, talked with Coburn and left. The girl declined to engage in prostitution. Johnson returned and beat her, and she then did engage in prostitution, with Coburn and his wife arranging her dates. After a couple of days of this Coburn drove the girl to Rome and delivered her back to Johnson.[5] The jury found that Coburn was a member of the conspiracy, and we will not disturb this finding. Coburn also attacks the alleged failure of the government to promptly furnish a list of its witnesses. The list was furnished on the first day of trial. In view of the concurrent sentence, we need not discuss Coburn's conviction on Count 41.

IX. The government's appeal

The jury found Hatmaker and LeCompte guilty on Count One. The trial court, however, found the evidence insufficient to support verdicts against Hatmaker and LeCompte and granted their motions for judgments of acquittal. From these rulings the government appeals. We reverse.

[10] The government can appeal a judgment of acquittal entered after a verdict of guilt. In *U. S. v. Boyd,* 566 F.2d 929 (CA5, 1978), this court held such an appeal permissible pursuant to 18 U.S.C. § 3731 (1976). The decision in *Boyd* is not inconsistent with the principles announced in *U. S. v. Martin Linen Supply Co.,* 430 U.S. 564, 97 S.Ct. 1349, 51 L.Ed.2d 642 (1977). *See U. S. v. Scott,* —— U.S. ——, 98 S.Ct. 2187, 56 L.Ed.2d ——, (1978).

We must decide whether the evidence, viewed in the light most favorable to the government, was sufficient to support the jury's conclusions that beyond reasonable doubt the appellees conspired to violate § 1962(c).

[11] Under Count One Hatmaker and LeCompte were charged with a conspiracy to operate an interstate prostitution ring through a pattern of racketeering activity. Our affirmance of the convictions of Billy Johnson, Clemones, Charles Coburn, and Scott establishes that the government proved the existence of the conspiracy. Once the existence of a conspiracy is shown only slight evidence is required to warrant submitting to the jury the question of a particular defendant's membership. *See, e. g., U. S. v. Baldorrama,* 566 F.2d 560, 566 (CA5, 1978). The government was not required to prove that the appellees had full knowledge of all the details of the conspiracy. Knowledge of its essential nature—to operate a prostitution ring through a pattern of racketeering activity—is sufficient. *U. S. v. Brasseaux,* 509 F.2d 157, 160 (CA5, 1975). *See Blumenthal v. U. S.,* 332 U.S. 539, 557, 68 S.Ct. 248, 256, 92 L.Ed. 154, 168 (1947). In this case the evidence is sufficient that each appellee harbored the required intent to enter the conspiracy as well as the state of mind necessary to commit the object offense of conducting the affairs of an enterprise through a pattern of racketeering activity. *Compare U. S. v. Cantu,* 557 F.2d 1173 (CA5, 1977), *cert. denied,* —— U.S. ——, 98 S.Ct. 1236, 55 L.Ed.2d 763 (1978), with *U. S. v. Feola,* 420 U.S. 671, 95 S.Ct. 1255, 43 L.Ed.2d 541 (1975). *See* Marcus, *Criminal Conspiracy: The State of Mind Crime—Intent, Proving Intent, and Anti-federal Intent,* 1976 U.Ill.L.F. 627.

5. This was the girl "sold" to another pimp for $500.

[12] The evidence, as it relates to Hatmaker, shows that she operated a house of prostitution in Knoxville, Tennessee. In 1971 Billy Johnson called her from Rome, Georgia, and told her that he would bring Thelma Lunsford to Hatmaker's place in Knoxville for prostitution. He then brought Thelma to Hatmaker's house, and she did engage in prostitution there and turned her earnings over to Billy Johnson. In 1973 or 1974, Mildred Lunsford traveled with Billy Johnson and Thelma Lunsford from Rome, Georgia, to Chattanooga, then Mildred traveled by common carrier to Johnson City, Tennessee, where Hatmaker met her. Thereafter Mildred worked in Johnson City as a prostitute. On a second occasion, Hatmaker met Mildred on her arrival in Johnson City. Again, Lunsford worked as a prostitute in Johnson City. The evidence further reveals that Linda Bishop, a prostitute, worked at Hatmaker's establishment in Knoxville after traveling to Knoxville with Thelma Lunsford. She gave Hatmaker some of her earnings while there. Bishop left Knoxville and flew to Atlanta to meet Billy Johnson.

The evidence, as it relates to LeCompte, shows that he managed the Big Rig Truck Stop near Newport, Tennessee, and that the truck stop was one of the locations at which Billy Johnson placed his prostitutes. Thelma Lunsford was brought there by Billy Johnson. LeCompte was running the Big Rig, and Thelma gave him half the money she made. She overheard conversations between LeCompte and Billy Johnson regarding prostitution. When LeCompte was arrested, records were found in the cabin next to his residence which the jury could infer showed Thelma's daily earnings. Linda Bishop was brought to the Big Rig by Billy Johnson to engage in prostitution, and while there she gave part of her money to LeCompte. Catherine Weathers was brought by Billy Johnson from Roanoke, Virginia, to the Big Rig and introduced to LeCompte.

Thus, prostitutes were brought from out of state and delivered, or were sent from out of state and were met, and were set up in business at Hatmaker's and at the Big Rig. Some or all of them paid over earnings to Hatmaker or LeCompte and to Billy Johnson. Johnson, the pimp, discussed travel arrangements with Hatmaker. He talked prostitution with LeCompte and introduced Weathers to LeCompte. These things occurred in the conduct of prostitution, in which movement of women from place to place, and supervision of women by pimps, and division of money with the pimp and the operator, are characteristic. With respect to both Hatmaker and LeCompte the jury could infer that each knew that the essential nature of the conspiracy embraced a pattern of travel in interstate commerce by persons intending to advance their unlawful business enterprise through the commission of acts specified in 18 U.S.C. § 1961 and embraced the division of the earnings of the prostitutes who had been sent or brought in. The jury was entitled to reject inferences that Hatmaker and LeCompte each carried on a local enterprise and had no knowledge that the conspiracy into which they entered as participants involved interstate travel. The trial court erred in granting the motions for judgments of acquittal by Hatmaker and LeCompte.

The judgments of conviction of the individual appellants are AFFIRMED. The judgment acquitting Hatmaker and LeCompte on Count One is REVERSED and the case REMANDED for proceedings not inconsistent with this opinion.

UNITED STATES of America, Plaintiff-Appellee,

v.

MIke CLEMONES, Priscilla Scott, Charles Everett Coburn, Jr., Joseph Harold Johnson, and William Alonzo Johnson, Jr., Defendants-Appellants.

UNITED STATES of America, Plaintiff-Appellant,

v.

Edward Raymond LeCOMPTE and Kathy Hatmaker, Defendants-Appellees.

Nos. 76-3866, 76-3870.

United States Court of Appeals, Fifth Circuit.

Nov. 6, 1978.

Appeals from the United States District Court for the Northern District of Georgia; Albert J. Henderson, Jr., Chief Judge.

ON PETITIONS FOR REHEARING AND PETITIONS FOR REHEARING EN BANC

(Opinion 8/9/78, 5 Cir., 1978, 577 F.2d 1247).

Before JONES, GODBOLD and GEE, Circuit Judges.

PER CURIAM:

The opinion is modified by deleting the following language (p. 1255):

Once the existence of a conspiracy is shown only slight evidence is required to warrant submitting to the jury the question of a particular defendant's membership. *See, e. g., U. S. v. Baldarrama*, 566 F.2d 560, 566 (CA5, 1978).

The petitions for rehearing filed by Edward Raymond LeCompte, William Alonzo Johnson, Jr., Joseph Harold Johnson, Priscilla Scott and Mike Clemones are DENIED, and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petitions for rehearing en banc are DENIED.

The petition for panel rehearing filed by Kathy Hatmaker is DENIED.

APPENDIX EXHIBIT "C"

UNITED STATES OF AMERICA

VERSUS

CRIMINAL ACTION NO. CR-76-16-R

WILLIAM ALONZO JOHNSON, et al

ORDER

Presently pending in the above styled criminal case are the motions for judgment of acquittal of the defendants, Kathy Hatmaker and Edward LeCompte.

Both defendants were convicted on Count One of the indictment, which charges that they entered into a conspiracy with other named defendants to associate in a prostitution ring affecting interstate commerce, directly or indirectly conducted through a pattern of racketeering activities. 18 U.S.C. §1962(c). Both motions raise the same contentions: (1) insufficiency of the evidence and (2) a fatal variance between the indictment and the proof at trial. This latter point, because it is essentially a restatement of the first ground for judgment of acquittal, will be considered first.

A "variance" occurs when the evidence adduced at trial reveals the commission of a crime but does not substantiate the allegations of criminal activity alleged in the indictment. See Berger v. United States, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314 (1935). If this difference between allegation and evidence is material, it deprives the defendant of fair warning

of the charges that will be proved against him and constitutes a "fatal variance." See Kotteakos v. United States, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed 1557 (1946).

The indictment in this case charged Hatmaker and LeCompte with participation in a single conspiracy. They argue that, if the evidence proved any criminal activity at all, it demonstrated only separate, unrelated conspiracies with the defendant, William A. "Billy" Johnson, as the common co-conspirator in each and that, as a result, the proof of multiple conspiracies at trial amounted to a fatal variance from the single conspiracy theory underlying the indictment.

Although some courts are more inclined to find prejudice from the mere existence of variance in a conspiracy trial, see, e.g., United States v. Bertolotti, 529 F.2d 149 (2nd Cir. 1975); United States v. Sperling, 506 F. 2d 1323 (2nd Cir. 1974), the Fifth Circuit Court of Appeals has adopted a more restrictive view. When the indictment charges a single conspiracy and two or more are proved, there is no fatal variance if the evidence proves beyond a reasonable doubt that the defendant is guilty of at least one. See United States v. Wayman, 510 F.2d 1020 (5th Cir. 1975); United States v. Dryden, 423 F.2d 1175 (5th Cir. 1970); Parmenter v. United States, 279 F.2d 151 (5th Cir. 1960); Smith v. United States, 283 F.2d 245 (5th Cir. 1960); Jolly v. United States, 232 F.2d 83 (5th Cir. 1956).

Absent a showing of prejudice, which is not asserted here, the resolution of

the issue of a fatal variance depends upon whether the defendants were guilty of a criminal conspiracy at all. The variance problem, therefore, is necessarily incorporated into the insufficiency of evidence ground.

In order to support a conspiracy under 18 U.S.C. §1962(c), there must be proof of an agreement. Cf. United States v. Falcone, 311 U.S. 205, 61 S.Ct. 204, 85 L.Ed. 128 (1940). This "meeting of the minds" need not be express and can be shown by circumstantial evidence alone. See United States v. Gomez, 529 F.2d 412 (5th Cir. 1976). Once the conspiracy has been established, only slight evidence is required to link an individual defendant to the scheme, see United States v. Arteaga-Limones, 529 F.2d 1183 (5th Cir. 1976); United States v. Lawson, 523 F.2d 804 (5th Cir. 1975), and a defendant's personal stake in accomplishing the object of the conspiracy is one factor that bears on the possibility of his participation. See United States v. Hawes, 529 F.2d 472 (5th Cir. 1976).

Kathy Hatmaker operated a house of prostitution in Knoxville, Tennessee. Although Billy Johnson, the alleged head of the prostitution ring, occasonally sent his girls to work out of Hatmaker's residence, there was testimony that she had nothing to do with arranging or financing their transporation to or from her house.1/

1/ Mildred Lunsford testified on direct examination that Hatmaker had once met her at the bus station in Johnson City, Tennessee. However, she later admitted to three prior inconsistent statements on this point and finally retracted her identification of Hatmaker.

The most damaging testimony to connect Hatmaker to the conspiracy and the only other substantive reference to her was provided by Thelma Lunsford, who contended during her testimony that Billy Johnson had called Hatmaker by telephone to arrange an "appointment" for her in Knoxville, Tennessee. Because this testimony would permit, if not compel, the inference that Hatmaker knew of Johnson's illegal interstate activities, the issue of its admissibility is crucial.

Although the fact that a phone call was made by Johnson is admissible, his identification of Hatmaker as the other party to the conversation is hearsay. Rule 802, Fed. R.Evid. Since Lunsford did not testify that she was a party to the conversation, whether Johnson actually spoke to Hatmaker depends on his veracity. 2/ The co-conspirator exception to the rule is unavailing. 3/ While such declarations are admissible in certain circumstances, see United States v. Crockett, 514 F. 2d 64 (5th Cir. 1975), there must first be independent proof that the defendant was a member of the conspiracy. See United

---

2/ No similar problem would be presented if Johnson had testified to and authenticated his conversation with Hatmaker, Rule 901 (a) (6), Fed.R.Evid.; cf. United States v. Romano, 482 F.2d 1183 (5th Cir. 1973); see also McCormick, Evidence, §226; and no hearsay problem would be involved. Rule 801(d) (2) (A), Fed.R.Evid.

3/ Rule 801(d)(2)(E), Fed.R.Evid., considers statements of co-conspirators in a proper case, as not being hearsay.

States v. James, 510 F.2d 546 (5th Cir. 1975); United States v. Perez, 489 F.2d 51 (5th Cir. 1973). Thelma Lunsford's statements here, however, provide the only proof to associate Hatmaker with the conspiracy.[4/]

Consequently, the only facts clearly proved by the prosecution are that Hatmaker operated a house of prostitution in Knoxville and that, on occasion, Johnson's girls worked for her. From these facts, a reasonable inference may be drawn that she had a business relationship with Johnson. The mere participation in prostitution activities is not a federal crime. See Twitchell v. United States, 313 F.2d 425 (9th Cir. 1963), vacated on other grounds sub nom., 376 U.S. 188 (1964).

A similar analysis is mandated in the

4/ It is doubtful that Lunsford's testimony alone would support Hatmaker's conviction. Admission of hearsay testimony without objection is harmless error if there is sufficient independent evidence to sustain the defendant's conviction, e.g., United States v. Anderson, 485 F.2d 239 (5th Cir. 1973), and of the three separate references to the phone conversations, Hatmaker objected only to the second. Because these hearsay statements are the only evidence relating to Hatmaker, it clearly affects the "substantial rights" of the defendant and cannot be used to uphold the verdict. See United States v. Gomez, supra; United States v. Rodriguez, 524 F.2d 485 (5th Cir. 1975).

case of Edward LeCompte. He owned a truckstop in Rogersville, Tennessee and there was testimony that Johnson sent his girls there to engage in prostitution. As was the case with Hatmaker, LeCompte had nothing to do with arranging transportation to or from his place of business. Again, the most pertinent information came from Thelma Lunsford, who stated that she had observed LeCompte and Johnson discussing prostitution.

Based on the admissible evidence against Hatmaker and LeCompte, the jury could reasonably draw the inference that both defendants were involved with Johnson in prostitution activities. What is required to support their convictions, however, is further proof of a knowing association with the interstate prostitution scheme and the evidence at the trial does not permit this further inference. Cf. United States v. Bloom, 482 F.2d 1162 (8th Cir. 1973). See also Direct Sales Co., Inc. v. United States, 319 U.S. 703, 63 S.Ct. 1265, 87 L.Ed. 1674 (1943).

> The basic conspiracy, which the government spent a great deal of time proving, was not a conspiracy to commit federal offenses, with which (the defendant) is charged. Some of the co-conspirators may have intended to import out of state girls, and may have done so. But the basic conspiracy could have been carried on without these activities, and we do not

think that the evidence sufficiently ties (the defendant) in with a participation in, or a knowledge of or a purpose to commit the federal offenses that must be shown. . . . . .

Twitchell v. United States, supra at 429.

Accordingly, the motions of Kathy Hatmaker and Edward LeCompte for judgment of acquittal are granted.

So ordered this 17 day of September, 1979.

Albert J. Henderson, Jr. /s/
Judge, United States District Court for the Northern District of Georgia

UNITED STATES of America, Plaintiff-Appellee,

v.

Edward Raymond LeCOMPTE and Kathy Hatmaker, Defendants-Appellants.

No. 78-5780.

United States Court of Appeals, Fifth Circuit.

July 18, 1979.

After remand from prior appeals, 577 F.2d 1247 and 582 F.2d 1373, defendants were convicted in the United States District Court for the Northern District of Georgia, at Rome, Albert J. Henderson, Jr., J., of conspiracy in connection with the operation of a large multistate prostitution ring, and they again appealed. The Court of Appeals held, inter alia, that the trial court did not commit reversible error in refusing to instruct on the difference between single and multiple conspiracies.

Affirmed.

1. Criminal Law ⇐1173.2(1)

Where evidence in prosecution for conspiracy in connection with operation of interstate prostitution ring showed that conspiracy was single-purpose and continuously ongoing undertaking, trial court did not commit reversible error in refusing to instruct jury on difference between single and multiple conspiracies. 18 U.S.C.A. § 1962(c).

2. Conspiracy ⇐48.2(2)

Even though evidence in conspiracy prosecution showed that some defendants did not take part in beatings, pistol whippings and threats committed by other defendants, trial court properly refused requested charge that acts of other defendants could not be chargeable or imputed to appealing defendants since, if such acts were done in furtherance of conspiracy and appealing defendants were members of such conspiracy, law made latter defendants responsible for acts of their coconspirators; court adequately protected appealing defendants' rights by instructing jury that it should consider evidence separately as to each defendant and each count. 18 U.S.C.A. § 1962(c).

3. Criminal Law ⇐42

Record in prosecution for conspiracy in connection with operation of interstate prostitution ring did not support defendant's contention that she should receive equitable immunity on basis of representations made by United States Attorney in another district, to effect that she would not be indicted in that district if she gave statement; record likewise refuted contention that such statement was improperly "used" in later prosecution of defendant in Northern District of Georgia. 18 U.S.C.A. § 1962(c).

Appeals from the United States District Court for the Northern District of Georgia.

Before TUTTLE, GODBOLD and RUBIN, Circuit Judges.

PER CURIAM:

The present appellants, LeCompte and Hatmaker, and several co-defendants were charged with violating several statutes in the operation of a large, multistate prostitution ring. The motions of these appellants for judgment of acquittal were granted at trial on all counts

Synopses, Syllabi and Key Number Classification
COPYRIGHT © 1979, by WEST PUBLISHING CO.
The Synopses, Syllabi and Key Number Classification constitute no part of the opinion of the court.

except Count One, charging a RICO conspiracy under 18 U.S.C. § 1962(c). The jury found appellants and the co-defendants guilty on this count, and the court granted appellants' motions for judgment of acquittal notwithstanding the verdict. On appeal by all defendants and cross-appeal by the government, we reversed as to LeCompte and Hatmaker and reinstated the jury's verdict finding them guilty under Count One. *U. S. v. Clemones*, 577 F.2d 1247 (CA5), *modified*, 582 F.2d 1373 (CA5, 1978). They now appeal from the judgments of conviction entered on remand.

[1] Both appellants contend that the court reversibly erred in refusing to instruct on the difference between single and multiple conspiracies. In our earlier decision we described the conspiracy in detail and held that it was "a single-purpose and continuously ongoing undertaking to operate a multi-state prostitution enterprise," 577 F.2d 1253. The multiple-single point was there raised in terms of variance. It is raised here in terms of failure to instruct. But the facts that compelled our previous conclusion that this was a single conspiracy require us to conclude now that no instruction was required. Nothing is presented to us that makes a different decision appropriate in this appeal. The trial court did not err to the prejudice of these two defendants by refusing to instruct the jury on the difference between single and multiple conspiracies.

[2] Both appellants assert that they were the victims of devastating spillover from testimony describing acts of co-defendants, especially the prostitution ringleader Billy Johnson, including beatings, pistol whippings, threats of killing, and other unsavory activities in which appellants were not involved. The evidence against appellants is not as strong as that against other defendants and they were not shown to be involved in the foregoing violent acts. But the Constitution does not require that in a charge of group crime a trial be free of any prejudice but only that the potential for transferability of guilt be minimized to the extent possible. *U. S. v. Elliott*, 571 F.2d 880 (CA5, 1978). This standard was met here. The court properly refused a requested charge that the acts of Billy Johnson could not be "chargeable or imputed" to the other defendants. If the acts were done in furtherance of the conspiracy and appellants were members of the conspiracy, the law makes appellants responsible for the acts however repugnant. The court adequately protected appellants' rights by instructing the jury that it should consider the evidence separately as to each defendant and each count.

[3] Hatmaker makes an individual contention that the indictment should have been dismissed as to her because she was entitled to equitable immunity arising from events that occurred in the Southern District of Indiana. She gave an incriminating statement in the Southern District of Indiana against a person named Feinstein, not a defendant in this case and charged there with prostitution activities. She did so induced by representations given by a U. S. Attorney in the Southern District of Indiana. According to the U. S. Attorney, Hatmaker was only told that she would not be indicted in the Southern District of Indiana. Later she was indicted in the Northern District of Georgia in the present case, and she insists that the government breached its agreement with her by "using" her Indiana statement in this case. Hatmaker does not quite say that she was promised that she would not be indicted anywhere on prostitution-related activities; she seems to say that the exact scope of the promise was unclear and that in such situations the government may not use against her in any way the statement she gave and that the statement revealed names of persons who were witnesses in the Georgia case. No plea bargain is involved. Hatmaker was simply a witness in Indiana. Pretermitting whether immunity based upon giving testimony can ever be conferred by any agency other than the court,[1] Hatmaker has not proved that the U. S. Attorney in Indiana promised her immunity from anything beyond being indicted in the case there. Nor does it appear that the statement she gave in Indiana was "used" in this case. It came into possession of an FBI agent who had investigated the Georgia case, but after he had learned the names of witnesses, had interviewed them, and they had testified before the grand jury. It came into possession of the prosecuting attorney shortly before the grand jury returned the indictment. Nothing indicates that the statement was used by the grand jury, and it was not used at trial. Assuming the government was required to prove that the Georgia indictment was based upon information independent of the Indiana statement, we think it did so.

The convictions are AFFIRMED.

1. *See U. S. v. Donahey*, 529 F.2d 831, 832 (CA5, 1976).

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

APPENDIX EXHIBIT "E"

NUMBER 78-5780

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

PLAINTIFF-APPELLEE,

v.

EDWARD RAYMOND LECOMPTE AND
KATHY HATMAKER,

DEFENDANTS-APPELLANTS

MOTION FOR REHEARING AND FOR
REHEARING EN BANC
ON BEHALF OF DEFENDANT
EDWARD RAYMOND LECOMPTE

A. CECIL PALMOUR
COOK & PALMOUR
Post Office Box 370
Summerville GA 30747

COUNSEL FOR DEFENDANT-
APPELLANT LECOMPTE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE

v. NUMBER 78-5780

EDWARD RAYMOND LECOMPTE
and KATHY HATMAKER,
DEFENDANTS-APPELLANTS

I. CERTIFICATE OF COUNSEL

The undersigned, counsel of record for Defendant-Appellant Edward Raymond LeCompte, certifies that the following listed party has an interest in the outcome of this case. These representations are made in order that Judges of this Court may evaluate possible disqualification or recusal pursuant to Local Rule 13(a):

None.

/s/ A. Cecil Palmour

Attorney of Record for
Defendant-Appellant
Edward Raymond LeCompte

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE

v. NUMBER 78-5780

EDWARD RAYMOND LECOMPTE
and KATHY HATMAKER,
DEFENDANTS-APPELLANTS

MOTION FOR REHEARING AND FOR REHEARING EN BANC ON BEHALF OF DEFENDANT EDWARD RAYMOND LECOMPTE

II. REQUIRED STATEMENT FOR REHEARING EN BANC

I express a belief based on reasoned and studied professional judgment that the court inadvertently overlooked the case of *United States v. Malatesta*, (5 Cir. March 12, 1979) 590 F.2d 1379, and *United States v. James*, (5 Cir. Feb. 12, 1979) 590 F.2d 575.

We called the court's attention to these cases at oral argument, and had briefed it upon this court's request of March 23, 1979, to comment upon "relevant intervening decisions that have been rendered since (our) last brief was filed." (Court's memo)

The court's opinion here discussed neither the *Malatesta* case nor the principle involved. We attach herewith the memo we furnished the court on March 26, 1979.

We say that *LeCompte* should have the benefit of *James* and *Malatesta* because this court amended its opinion in *LeCompte* on November 6, 1978 (582 F.2d 1373), which was two days prior to its grant of *en banc* herein in *Malatesta*, which was on Nov. 8, 1978 (583 F.2d 748).

James (above) was decided on Feb. 12, 1979. A circumstance here highly relevant in that the District Court here did determine "at the end of the trial" (apropos *James*, 590 F.2d at 582) that *LeCompte's* connection with the conspiracy had not been established.

The *James* principle we here urge (regardless of order of proof) is that the Judge determine the admissibility of hearsay under the new rules of evidence (590 F.2d at pp. 578-579). The Judge in LeCompte's case did make this determination in ruling upon LeCompte's motion.

Although the District Judge found the evidence insufficient to connect neither *LeCompte* nor *Hatmaker* to the conspiracy, he did express adherence to the "slight evidence" rule rejected in *Malatesta* (590 F.2d at p. 1382).

The evidence connecting both *LeCompte* and *Hatmaker* to the conspiracy was at most "slight evidence" and accordingly their acquittals by the trial judge was appropriate either under *James* or *Malatesta*.

SUMMARY:

LeCompte should have the benefit of *James* and *Malatesta* because his case was under consideration prior to the grant of *en banc* hearing in

Malatesta, and because his case fits these decisions as to acquittal.

Respectfully,

COOK & PALMOUR,

Attorneys for Defendant-Appellant Edward Raymond LeCompte

By: /s/ A. Cecil Palmour

COOK & PALMOUR
Attorneys at Law
Post Office Box 370
Summerville GA 30747

CERTIFICATE OF SERVICE

I have served the Government with the above and foregoing motion for rehearing and for rehearing en banc, by mailing a copy of same to Mr. William L. Harper, United States Attorney, 428 U. S. Courthouse, 56 Forsyth Street, N.W., Atlanta, Georgia 30303.

This 26th day of July, 1979.

/s/ A. Cecil Palmour
Of Counsel for Defendant-Appellant Edward Raymond LeCompte

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE

V. NUMBER 78-5780

EDWARD RAYMOND LE COMPTE,
DEFENDANT-APPELLANT

MEMORANDUM COMMENTING UPON "RELEVANT INTERVENING DECISIONS . . RENDERED SINCE (OUR) LAST BRIEF WAS FILED"

Later cases which show merits of LeCompte's contention on the question of conspiratorial connection.

On March 12, 1979, this Court "banished" the "slight evidence" rule theretofore applied in conspiracy cases "as to all appeals hereafter to be decided by this court." U.S. V. Malatesta (No. 77-5032, slip opinion, p. 3403, 3406).

This is a "slight evidence" case because the trial judge here directed acquittal, even though he applied the "slight evidence" test (R._____, Trial Judge's order). This Court reversed in U.S. v. LeCompte, et al., 577 F.2d 1247 (Aug.1978) stating that "once the existence of a conspiracy is shown only slight evidence is required to warrant submitting to the jury the question of a particular defendant's membership". (Id., at p. 1255) (emphasis ours).

On petition for re-hearing en banc the above-quoted language was deleted (Nov. 6, 1978), without further comment.

One critical aspect of this case was the Government's contention that certain statements of alleged co-conspirators were subject to jury consideration under the new Federal Rules of Evidence (Gov't. brf. pp. 87-92). It was there argued that this evidence caught Hatmaker and LeCompte in the conspiratorial net (at pp. 90, 91, 92). U.S. v. James, (nos. 77-5188, 77-5271, slip opinion Feb. 12, 1979, at pp. 3257 and 3259 - 5th Cir.) establishes the proposition [overruling U.S. v. Appollo, 476 F.2d 156 (1973)] that the initial determination should be made by the Judge. While the district judge's conclusion here was made in the order directing verdicts, his decision was "whether a conspiracy existed and whether the defendants and declarant were members of it". James (above, slip op., div. 4, at p. 3259).

> "'As a preliminary matter, there must be substantial independent evidence of a conspiracy, at least enough to take the question to the jury. Whether the standard has been satisfied is a question of admissibility of evidence to be decided by the trial judge.'" James (above), slip op., at p. 3260, quoting from U.S. v. Nixon, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974) (emphasis by the court).

James also discusses the order of proof, designed to avoid prejudice to defendant (Id., at pp. 3261-3262). However, an order made "At the End of Trial" is also discussed (Id., at p. 3262). If such evidence has not been connected up at the end of the trial, there seems no objection to the Judge's decision taking the

form of a directed verdict.

While the decisions in Malatesta and in James do not facially require retroactivity as to LeCompte, several things suggest the propriety of giving consideration to LeCompte's circumstance:

1) This is the same case, and appellate decision has not become final.

2) The district court did not here give the "slight evidence" instruction to the jury, and hence LeCompte was not in a position requiring him to except to such as an improper instruction under Hall (525 F.2d 1254) or Marionneau (514 F.2d 1249).

3) This case was originally before the Court at the same time en banc hearing was granted in Malatesta, 583 F.2d 748. (This Court's supplementary opinion deleted the "slight evidence" language on Nov. 6, 1978, and granted en banc in Malatesta on Nov. 8, 1978.) When this Court denied LeCompte's petition for rehearing (on Nov. 6, 1978), in which it deleted the "slight evidence" language of its original opinion, did it not then have in mind the potential inapplicability of this rule? Even though the "slight evidence" rule was not discarded until March 12, 1979, it was discarded in the Malatesta case, following its decision of Nov. 8, 1978, to hear en banc.

The coincidence of the consideration of "slight evidence" in LeCompte and Malatesta, we respectfully suggest, makes appropriate its application in LeCompte.

4) This Court in LeCompte did not state whether it applied the "slight" or "substantial" evidence test.

5) The common understanding in the Circuit that the "slight evidence" test was appropriate (see concurrence of Judge Coleman, 583 F.2d at pp. 762, 763) justified defendant's failure to raise the question. U.S. v. Morales (5 Cir. 1973) 477 F.2d 1309, 1315; U.S. v. Freeman (D.C. 1975) 514 F.2d 1314.

6) If the District Court had applied his conclusion (as to the insufficiency of the evidence to establish conspiratorial connection) in the context of James (above) rather than upon motion for acquittal, a different review question would be presented, upon the same evidentiary consideration.

7) The Court's function does not rule out consideration of oversights which are serious. Western Pac.R. Corp. v. WPR Co., 345 U.S. 247, 73 S.Ct. 656 (1952). We especially refer to LeCompte's contention made here and in original appeal of lack of evidence of conspiratorial connection (the conclusion

reached by the District Court).

Respectfully submitted,

COOK & PALMOUR

Attorneys for
Defendant-Appellant

Edward Raymond LeCompte

BY: /s/ A. Cecil Palmour

A. Cecil Palmour

COOK & PALMOUR
Attorneys at Law
Post Office Box 370
Summerville GA 30747

APPENDIX EXHIBIT "F"

Law Offices
COOK & PALMOUR
Summerville, Georgia 30747

September 6, 1979

Hon. Edward W. Wadsworth, Clerk
United States Court of Appeals
Fifth Circuit
600 Camp Street
New Orleans, Louisiana 70130

Re: No. 78-5780, United States of America, Plaintiff-Appellee, v. Edward Raymond LeCompte, Defendant-Appellant

Dear Mr. Wadsworth:

Please consider this as an application to file supplemental memorandum upon our contention that this Court should apply to Appellant LeCompte this Court's decision in United States v. Malatesta, (5 Cir. Mar. 12, 1979) 590 F.2d 1379.

We wish to call to the Court's attention the case of Hankerson v. State of North Carolina, 97 S.Ct. 2339 (1977), decided June 17, 1977.

We believe that the Supreme Court in this case has supported the position we have already taken here:

> "When the Court declines to hold a new constitutional rule retroactive, one chance beneficiary - the lucky individual whose case was chosen as the occasion for announcing the new principle - enjoys retroactive application, while others similarly situated have their claims adjudicated under the old doctrine. This hardly comports with the ideal of 'administration of justice with an even hand'. Desist v. United States, supra, at 255 (Douglas, J., dissenting)."

Not only this language, but the decision itself, affirms this principle.

Yours very truly,

A. CECIL PALMOUR

ACP/ab
cc: Mr. William L. Harper
United States Attorney
428 U. S. Courthouse
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

APPENDIX EXHIBIT "G"

[Godbold]
IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U. S. COURT OF APPEALS
FILED
NOV 14 1979
GILBERT F. GANUCHEAU
CLERK

NO. 78-5780

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

EDWARD RAYMOND LE COMPTE, and
KATHY HATMAKER,

Defendants-Appellants.

- - - - -

Appeals from the United States District Court
for the Northern District of Georgia

- - - - -

ON PETITION FOR REHEARING AND
PETITION FOR REHEARING EN BANC

(Opinion 7-18-79, 5 Cir., 197_, ___F.2d__).

(November 14, 1979)

Before TUTTLE, GODBOLD and RUBIN,
Circuit Judges.

PER CURIAM:

The Petitions for Rehearing of appellants Kathy Hatmaker and Edward Raymond Le Compte are DENIED, and no member of this panel nor Judge in regular active service on the court having requested that the court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc of appellant Edward Raymond LeCompte is DENIED.

ENTERED FOR THE COURT:

/s/ John C. Godbold
United States Circuit Judge